12/3/99

(12)

No. 98-1991

In The

# Supreme Court of the United States

PUBLIC LANDS COUNCIL, *ET AL.*,

*Petitioners,*

v.

BRUCE BABBITT, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, *ET AL.*,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## *AMICUS CURIAE* BRIEF OF NORTHWEST MINING ASSOCIATION IN SUPPORT OF PETITIONERS


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## *AMICUS CURIAE* BRIEF OF NORTHWEST MINING ASSOCIATION IN SUPPORT OF PETITIONERS

Northwest Mining Association ("NWMA") respectfully submits this *amicus curiae* brief in support of Petitioners, Public Lands Council, *et al.* Pursuant to Supreme Court Rule 37(3)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

## IDENTITY AND INTEREST OF *AMICUS CURIAE*

NWMA is a non-profit, non-partisan, membership, trade association organized under the laws of the State of Washington, with its principal place of business in Spokane, Washington. NWMA was founded in 1895 by miners from the states of Idaho, Montana, and Washington, as well as several Canadian provinces. NWMA currently has 2,500 members residing in 42 states and 8 Canadian provinces. NWMA's purposes are: (1) to support and advance mineral resource and related industries; (2) to represent and inform members on technical, legislative, and regulatory issues; (3) to provide for the dissemination of educational material related to mining; and (4) to foster and promote economic opportunity and environmentally responsible mining.

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[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), NWMA represents that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than NWMA, made a monetary contribution for the preparation or submission of this brief.

For over 104 years, NWMA's members have conducted exploration and mining operations on the public lands in accordance with the General Mining Law of 1872, 30 U.S.C. § 21 *et seq.* ("Mining Law"). The public lands are a major source of domestic mineral production. Hardrock mining on the public lands also provides the highest paid non-supervisor wage jobs in the Nation. More importantly, the hardrock mining industry is closely tied to the livestock industry because both industries are the cornerstones of western rural economies and form the foundations for the way of life in the West.

The issue in this case goes to the heart of the Separation of Powers Doctrine that the Framers established in the Constitution. The Property Clause of the U.S. Constitution grants Congress, not the Executive Branch, *sole* control over the public lands:

> Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

U.S. Const., Art. IV, § 3, cl. 2. Pursuant to that Clause, Congress enacted the Taylor Grazing Act, 43 U.S.C. § 315 *et seq.*, which, *inter alia*: (1) mandated that "grazing privileges recognized and acknowledged" be "safeguarded;" (2) established who owns range improvements constructed on the public lands; and (3) set forth who was eligible to be issued grazing permits. For over 61 years, the livestock industry relied upon the U.S. Department of the Interior's consistent interpretation and administration of the Taylor Grazing Act with respect to these issues.



In 1995, Secretary Bruce Babbitt unilaterally reversed the Department's longstanding interpretation and administration of the Taylor Grazing Act. Secretary Babbitt made those changes without Congress amending or repealing any portion of the Taylor Grazing Act. The U.S. District Court for the District of Wyoming held that Secretary Babbitt's actions violated the Taylor Grazing Act. *Public Lands Council v. Babbitt*, 929 F.Supp. 1436 (D. Wyo. 1996). However, a divided panel of the U.S. Court of Appeals for the Tenth Circuit reversed the District Court's decision. *Public Lands Council v. Babbitt*, 167 F.3d 1287 (10th Cir. 1999).

If the Tenth Circuit's decision is allowed to stand, it will seriously impact NWMA and its members. Indeed, if the Tenth Circuit's decision is allowed to stand, there will be nothing to stop Secretary Babbitt from rewriting the Mining Law in the same manner that he rewrote the Taylor Grazing Act. In fact, NWMA has already felt the effect of Secretary Babbitt's "disdain" for the Mining Law. For example, in 1997, Secretary Babbitt promulgated hardrock bonding regulations in violation of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq. Northwest Mining Association v. Babbitt*, 5 F.Supp.2d 9 (D.D.C. 1998). Later that same year, Secretary Babbitt approved a Solicitor's Opinion that reversed 125 years of consistent interpretation of the Mining Law.[2] M-36988, *Limitations on Patenting*

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[2] The Solicitor based his opinion solely on his own personal dislike for the Mining Law. Leshy, *Reforming the Mining Law: Problems and Prospects*, 9 Pub. Land L. Rev. 1, 11 (1988) ("[b]old administrative actions like major new withdrawals, *creative rulemakings*, and aggressive environmental enforcement" could force Congress to change the Mining Law) (emphasis added).

*Millsites Under the Mining Law of 1872* (November 7, 1997). Finally, Secretary Babbitt has consistently sought to avoid having to issue patents as he is statutorily required to do under the Mining Law. *See e.g., C.P. Jeppesen, Jr. v. Babbitt*, No. 96-0324-2-BLW (D. Idaho May 21, 1999); *Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167 (10th Cir. 1997); *Barrick Goldstrike Mine, Inc. v. Babbitt*, No. CV-N-93-550-HDM (PHA), 1995 WL 408667 (D. Nev.). Because NWMA seeks to ensure that public lands laws are executed in accordance with Congress' intent, it respectfully submits this *amicus curiae* brief in support of Petitioners.

## SUMMARY OF ARGUMENT

This Court should reverse the Tenth Circuit's decision for a number of reasons. First, Secretary Babbitt's new "permitted use" rule violates Congress' mandate that "grazing privileges" be "safeguarded" because it eliminates the adjudicated "grazing preferences" that livestock operators have relied upon for decades. Second, Secretary Babbitt's new "range improvement" rule conflicts with Congress' unambiguously expressed intent that livestock operators are to own range improvements that they pay for and construct. Finally, Secretary Babbitt's new "mandatory qualifications" rule frustrates Congress' intent in passing the Taylor Grazing Act because it allows the Secretary to issue grazing permits to those people who have no intention to graze livestock.



## ARGUMENT

### I. THE TAYLOR GRAZING ACT MUST BE INTERPRETED IN ACCORDANCE WITH CONGRESS' INTENT IN 1934.

The primary question in this case is whether Secretary Babbitt's new "rules" violate Congress' intent. The controlling intent is that of the Congress that actually passed the Taylor Grazing Act. *Andrus v. Charlestone Stone Products Co., Inc.*, 436 U.S. 604, 611 (1978) (the relevant inquiry is whether Congress intended water to be a "valuable mineral deposit" when it passed the Mining Law in 1872). Congress' intent is generally reflected in the ordinary meaning of the language used in a statute:

> Deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires [courts] to assume that the legislative purpose is expressed by the ordinary meaning of the words used.

*United States v. Locke*, 471 U.S. 84, 95 (1985). Thus, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning . . . *at the time that Congress enacted the statute.*" *Perrin v. United States*, 444 U.S. 37, 42 (1979) (emphasis added). However, in interpreting a public land statute that was enacted during an earlier period in the Nation's history, a court:

> "[*M*]*ay with propriety recur to the history of the times when it was passed*; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it."

*Leo Sheep Co. v. United States*, 440 U.S. 668, 670 (1979) (emphasis added) (quoting *United States v. Union Pacific R. Co.*, 91 U.S. 72, 79 (1875)); *accord, Amoco Production Co. v. Southern Ute Indian Tribe*, ___ U.S. ___, 119 S.Ct. 1719, 1725-1726 (1999) (reviewing condition of the country when Congress passed the Coal Land Acts of 1909 and 1910 to determine the meaning of the word "coal"); *see also, Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 46-56 (1983) (reviewing purposes behind the Stock-Raising Homestead Act of 1916 to determine whether Congress intended "gravel" to be one of the minerals reserved under that act). Therefore, in discerning Congress' intent, this Court should consider the language and the purposes of the Taylor Grazing Act, as well as the condition of the country in 1934.

## II. CONGRESS INTENDED TO PROVIDE CERTAINTY AND STABILITY TO THE LIVESTOCK INDUSTRY.

### A. Congress Mandated That The Secretary "Safeguard" "Grazing Privileges Recognized And Acknowledged."

Prior to 1934, ranchers had an "implied license," growing out of years of congressional acquiescence, to use the public lands for livestock grazing. *See, Buford v. Houtz*, 133 U.S. 320, 326 (1890). In 1934, however, the Nation was recovering from one of the most severe droughts in history, which had left the public lands barren of forage. P. Gates, *History of Public Land Law Development* (Public Land Law Review Commission 1968) at 607-613. Cattle prices had also fallen dramatically, which meant that more cattle remained on the depleted range



because livestock operators could not afford to ship them to market. *See, id.* at 607. Because of these conditions, the livestock industry was on the brink of disaster. *Id.* at 610 ("[t]he combination of drought with poor forage and the low prices . . . demoralized the livestock industry"). Accordingly, Congress passed the Taylor Grazing Act to "stabilize the livestock industry dependent upon the public range." 78 Cong. Rec. 5371 (1934) (remarks of Representative Taylor quoting from the title of the bill).

To achieve that goal, Congress instructed the Secretary to designate public lands "chiefly valuable for grazing and raising forage crops" and to withdraw those lands from application of the homestead laws by placing them in "grazing districts." 43 U.S.C. § 315. Congress believed that designating those lands solely for livestock purposes "would promote the highest use of [those lands] pending [their] final disposition." *Id.* Congress knew, however, that there were would be more livestock operators who desired to use the forage within the grazing districts than could be accommodated. *See*, H.R. Rep. No. 73-903 at 1 (1934). Accordingly, Congress established a priority system by which the Secretary could issue grazing permits to the competing livestock operators based upon prior use of the range. 78 Cong. Rec. 5372 (1934) ("[t]here are many vested rights, which should and must be respected and protected, which have grown up on the range"). This priority system is set forth in Section 3 of the Taylor Grazing Act:

> [T]he Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock

> owners as under his rules and regulations are entitled to participate in the use of the range . . . . Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them. . . . So far as consistent with the purposes and provision of this [Act], grazing privileges recognized and acknowledged shall be adequately safeguarded . . . .

43 U.S.C. § 315b.

Congress also knew that livestock operators who received grazing permits had to have "some assurance as to . . . what they can definitely rely upon in the way of pasturage." 78 Cong. Rec. 5371 (1934). Indeed, without assurance of the amount of forage that livestock operators would receive:

> [T]here would be no permanence to the business. People who have herds would not be safe; they would have no credit with the banks for securing money. They cannot secure money from the banks if they cannot show that they have some definite and sufficient place on the range where their stock may be adequately grazed.

*Id.* Thus, Congress intended for the Secretary, in addition to issuing grazing permits, to determine the amount of forage that each livestock operator was entitled to use. More importantly, once the Secretary determined the



amount of forage that each livestock operator was entitled to use, Congress mandated that the Secretary "adequately safeguard" those "grazing privileges recognized and acknowledged." 43 U.S.C. § 315b.

### B. The Department "Recognized And Acknowledged" "Grazing Privileges" By Granting "Grazing Preferences."

After enactment of the Taylor Grazing Act, the Department immediately began the process contemplated by Congress to allocate "grazing privileges" among the competing livestock operators. *See e.g., The Nature and Extent of the Department's Authority to Issue Grazing Privileges*, 56 I.D. 62 (1937). That twenty-year process involved, *inter alia*, a "case-by-case" assessment of the historical use and forage capacity of the public lands each livestock operator sought to graze. *See, Public Lands Council*, 167 F.3d at 1309-1310 (Tacha, J., dissenting). Successful livestock operators were then granted a specific "grazing preference," measured in AUMs, *i.e.*, the amount of forage that would sustain one animal for one month. *Id.* A "grazing preference" allowed a livestock operator to graze up to a certain amount of forage, not just for the life of a permit, but for as long as the Secretary allowed the operator to graze on the public lands.[3] *See, Shufflebarger v.*

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[3] The forage actually authorized for use by a livestock operator in a given year usually differed from the amount granted by the "grazing preference" because of changes in the condition of the range. *See, McClean v. Bureau of Land Management*, 133 IBLA 225, 232 (1995) ("increased forage production on the Federal range had absolutely no effect on

*Commissioner*, 24 T.C. 980, 992 (1955) (an adjudicated "grazing preference" was an "indefinitely continuing right"). That "grazing preference" attached to the operator's "base property" and followed the "base property" if it was transferred, thereby providing predictability and security to livestock operators in accordance with Congress' intent. *Public Lands Council*, 929 F.Supp. at 1440. More importantly, because an adjudicated "grazing preference" was a property right it could not be canceled, suspended, or reduced without an evidentiary hearing that afforded the livestock operator due process of law. Falen and Budd-Falen, *The Right to Graze Livestock on the Federal Lands: The Historical Development of Western Grazing Rights*, 30 Idaho L. Rev. 505, 508 (1994); *see also*, 43 C.F.R. §§ 4.470-.478 (1995).

### C. Secretary Babbitt Unilaterally Eliminated All Existing "Grazing Preferences."

In 1995, Secretary Babbitt redefined the term "grazing preference" to mean only "a superior or priority position against others for the purpose of receiving a grazing permit." 43 C.F.R. § 4100.0-5 (1995). This new definition makes no reference to the "grazing preferences" that the Department granted to livestock operators after passage of the Taylor Grazing Act. In fact, Secretary Babbitt admits that his new rule ends the Department's longstanding recognition of the adjudicated levels of

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grazing preferences, but merely meant that those who had established grazing preferences could exercise more of those preferences or be awarded additional use").



grazing. 60 Fed. Reg. 9921 (Feb. 22, 1995) ("[t]he definition omits reference to a specific quantity of forage, a practice that was adopted . . . during the adjudication of grazing privileges").

Having eliminated forage allocation from the concept of a "grazing preference," the Secretary now regulates forage as a mere "permitted use," defined as the forage allocated by a land use plan. 43 C.F.R. § 4100.0-5 (1995). As a "permitted use," a livestock operator's maximum grazable forage is now established solely by the land use plan adopted by the Department. Thus, Secretary Babbitt now has "unfettered discretion" to allocate forage use "without reference to the individual grazing decisions laboriously adjudicated by the [Department] following passage of the [Taylor Grazing Act]." *Public Lands Council*, 167 F.3d at 1314 (Tacha, J., dissenting).

Notwithstanding the fact that Secretary Babbitt eliminated all existing "grazing preferences" "with a mere stroke of his pen," the majority of the Tenth Circuit upheld Secretary Babbitt's actions. *Public Lands Council*, 167 F.3d 1295-1298. The majority based its ruling on its mistaken belief that the Department had eliminated all "grazing preferences" in 1978. *Id.*

In 1978, the Department amended some of its livestock grazing regulations to account for the minor changes that the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701 *et seq.*, made to the administration of livestock grazing on the public lands. 43 Fed. Reg. 29,058-29,076 (July 5, 1978). However, the Department did not interfere with the existing "grazing

preferences." To the contrary, the Department expressly preserved all existing "grazing preferences:"

> Serious concern was expressed . . . about how these grazing regulations will affect the livestock operators now authorized to graze on the public lands. . . . Livestock operators with a grazing license, permit, or lease will be recognized as having a preference for continued grazing use on these lands. *There [sic] adjudicated grazing use*, their base properties, and their areas of use (allotments) will be recognized under these grazing regulations.

43 Fed. Reg. at 29,058 (emphasis added); *see also*, 43 C.F.R. § 4100.0-5(o) (1978) ("[g]razing preference means the *total* number of animal unit months of livestock grazing on public lands apportioned and attached to base property") (emphasis added).[4]

That the Department continued to recognize "grazing preferences" after 1978 is supported by Congress' actions in 1993. That year, legislation was introduced that contained many provisions similar to the regulations that Secretary Babbitt eventually promulgated in 1995. H.R. 2520, 103d Cong., 1st Sess. (1993); 139 Cong. Rec. H9037-H9039 (1993). Although the sponsor of that legislation supported "rangeland reform," even he recognized the devastating impact that the elimination of "grazing preferences" would have on livestock operators. Thus, he

[4] The Department's preservation of all existing "grazing preferences" was in accordance with the savings provisions in FLPMA, wherein Congress mandated that all "valid existing rights," including "land use right[s] or authorization[s]," be preserved. 43 U.S.C. § 1701 note.



proposed legislation that would have preserved the "grazing preferences" upon which the livestock industry depended. 139 Cong. Rec. S14083, S14087 (1993) ("Grazing preference. I also felt eliminating this preference would devalue the permit in the eyes of the lending institution. I knocked that out.").

Thus, contrary to the assertion of the majority, the Department continually recognized "grazing preferences" until 1995. Accordingly, the majority should not have "deferred" to Secretary Babbitt's new interpretation of the Taylor Grazing Act. Instead, the majority should have held unlawful and set aside the "permitted use" rule because it is in direct violation of Congress' mandate that "grazing privileges recognized and acknowledged shall be adequately safeguarded."[5] 43 U.S.C. § 315b.

[5] The majority should have also struck down the "permitted use" rule because it reversed the Department's 61 years of consistent interpretation and administration of the Taylor Grazing Act. *Atchison, T. & S.F.R. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 (1973) (there is a strong presumption that Congress' intent will best be carried out if an agency adheres to its longstanding policies). This is especially true considering that livestock operators have relied upon their "grazing preferences" for decades. *See, Andrus v. Shell Oil Co.*, 446 U.S. 657, 673 (1980) (Department of the Interior cannot reverse its longstanding position regarding the patentability of oil shale mining claims to the detriment of the claim owners).

## III. CONGRESS INTENDED FOR LIVESTOCK OPERATORS TO OWN RANGE IMPROVEMENTS THEY PAID FOR AND CONSTRUCTED.

One of the goals of the Taylor Grazing Act was "to provide for the orderly use, improvement, and development of the range." 43 U.S.C. § 315a. To achieve that goal, Congress authorized livestock operators to construct range improvements on the public lands:

> Fences, wells, reservoirs, and other improvements necessary to the care and management of the permitted livestock may be constructed on the public lands within such grazing districts under permit issued by the authority of the Secretary, or under such cooperative arrangement as the Secretary may approve . . . .

43 U.S.C. § 315c.

Congress also knew that the livestock operators might resist investing their time and money into improving the public range unless they had some assurance that they would be adequately compensated if the right to use the range was granted to a different operator. Accordingly, Congress mandated that the livestock operators be reimbursed for improving the public range.

> No permit shall be issued which shall entitle the permittee to the use of such improvements constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements . . . .

43 U.S.C. § 315c (emphasis added).



In accordance with Congress' intent, the Department promulgated regulations that provided that a livestock operator would own all range improvements that the operator paid for and constructed pursuant to range improvement permits. 43 C.F.R. § 4120.6-3 (1978). Those regulations also provided that a livestock operator would own range improvements constructed pursuant to cooperative agreements under which the operator and the Secretary shared the expense of the improvement. 43 C.F.R. § 4120.6-2 (1978). A livestock operator, of course, held title to those range improvements only to the extent of the operator's actual contribution to the improvement. *Id.*

Secretary Babbitt's new "range improvement" rule makes all permanent range improvements subject to cooperative agreements. 43 C.F.R. § 4120.3-2(a) (1995). It also provides: "title to permanent range improvements such as fences, wells, and pipelines where authorization is granted after August 21, 1995 shall be in the name of the United States." 43 C.F.R. § 4120.3-2(b) (1995). Thus, under this new rule, the United States would own all future "permanent range improvements such as fences, wells, and pipelines" notwithstanding the fact that the livestock operator actually paid for and constructed the improvement.

The majority of the Tenth Circuit upheld Secretary Babbitt's new "range improvement" rule based upon its belief that the Taylor Grazing Act does not "unambiguously" mandate that a livestock operator must own range improvements that the operator paid for and constructed. *Public Lands Council*, 167 F.3d at 1303-1304. The

majority's ruling that the Taylor Grazing Act is ambiguous with respect to this issue is astounding.[6]

> The Taylor Grazing Act is very clear:
>
> > No permit shall be issued which shall entitle the permittee to the use of such *improvements constructed and owned by a prior occupant* until the applicant has paid to such prior occupant the reasonable value of such improvements. . . .

43 U.S.C. § 315c (emphasis added). The phrase "improvements constructed and owned by a prior occupant" can mean only one thing, *i.e.*, Congress intended for livestock operators to own range improvements they paid for and constructed.[7] *See, Public Lands Council v. Babbitt*, 167 F.3d at 1317 (Tacha, J., dissenting). This conclusion is supported by the fact that Congress reaffirmed its intention when it passed FLPMA. 43 U.S.C. § 1752(g) (mandating that the United States pay livestock operators for their "interest" in permanent improvements when public lands

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[6] Interestingly, Judge Seymour, who authored the majority opinion, also ruled that the word "coal" in the 1909 and 1910 Coal Land Acts was "ambiguous." *Southern Ute Indian Tribe v. Amoco Production Co.*, 151 F.3d 1251 (10th Cir. 1998), *rev'd, Amoco Production Co. v. Southern Ute Indian Tribe*, ___ U.S. ___ 119 S.Ct. 1719 (1999).

[7] This language simply cannot be read to mean that Congress intended for the United States to own range improvements that livestock owners paid for and constructed. Indeed, such an interpretation would frustrate Congress' whole purpose in encouraging livestock operators to invest their time and money into improving the public range. *See*, 43 U.S.C. § 315a ("to provide for the orderly use, improvement, and development of the range").



are devoted to another purpose). Therefore, because Congress has not once, but twice, "directly spoken to precise question at issue . . . that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

## IV. CONGRESS INTENDED FOR THE SECRETARY TO ISSUE GRAZING PERMITS TO ONLY THOSE ENGAGED IN THE LIVESTOCK BUSINESS.

The Taylor Grazing Act, as its name aptly indicates, is a livestock grazing act. *Public Lands Council*, 929 F.Supp. at 1436. Thus, it is not surprising that one had to be "engaged in the livestock business" to be eligible for a grazing permit. 43 C.F.R. § 4110.1 (1978). However, under Secretary Babbitt's new "mandatory qualifications" rule, any person who owns or controls "base property" may now be issued a grazing permit. 43 C.F.R. § 4110.1 (1995). Thus, Secretary Babbitt can deprive a livestock operator of the beneficial use of the public range by issuing a grazing permit to a person who has no interest in grazing livestock.

The Tenth Circuit upheld Secretary Babbitt's new "mandatory qualifications" rule by focusing solely on the following language from Section 3 of the Taylor Grazing Act: "[p]reference[s] shall be given . . . to those . . . landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights[.]" *Public Lands Council*, 167 F.3d at 1306. The Tenth Circuit interpreted this language as requiring that only